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CERTIFIED FOR PARTIAL PUBLICATION*

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. ROBERT CHESTER HENNING, Defendant and Appellant.	C058105 (Super. Ct. Nos. 62-072400, 62-026646, 62-072639, 62-075042)

APPEAL from a judgment of the Superior Court of Placer County, Mark S. Curry, Judge. Affirmed.

Barbara Coffman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Carlos A. Martinez, Supervising Deputy Attorney General, Jamie A. Scheidegger, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I-VI and VIII-XI.

Defendant, Robert Chester Henning, financially abused five elderly victims who came to him to purchase products to assist their physical mobility. A jury convicted him in case No. 62-072400 (consolidated with case Nos. 62-072639 and 62-075042) of five counts of financial elder abuse in violation of Penal Code section 368, subdivision (d),[1] and five counts of grand theft by false pretenses in violation of section 484 and section 487, subdivision (a). We refer to case No. 62-072400 as the financial elder abuse case. Based on the evidence presented to the jury on the financial elder abuse case, the trial court found defendant in violation of his probation in an earlier case (case No. 62-026649, hereafter the securities violation case). In that case defendant pled guilty to four counts of violating Corporations Code sections 25110/25540--selling unregistered, nonexempt securities.

The trial court sentenced defendant on the financial elder abuse case to state prison for the upper term of four years on count one, his conviction of financial elder abuse of Jeanette K., and to a consecutive one-year term (one-third of the middle term) on each of counts two through five, his convictions of financial elder abuse of Helen B., Doreen Y., Logan Y., and Grace R. The trial court imposed consecutive

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[1] Defendant sometimes refers to these counts as theft from an elder. We choose to refer to these counts as financial elder abuse. Further undesignated statutory references are to the Penal Code.

eight-month terms for counts six through ten, his convictions of grand theft by false pretenses, but stayed execution of the terms pursuant to section 654. After finding defendant had violated his probation on his securities violation case, the trial court sentenced defendant to consecutive eight-month terms (one-third of the middle term) for each of his four convictions of selling unregistered, nonexempt securities. Defendant's total prison sentence was 10 years and eight months.[2]

On appeal, defendant raises 11 claims regarding the financial elder abuse case. He contends the trial court erred in the admission of evidence and made instructional errors, that insufficient evidence supports his 10 convictions, that counts three and four are based on the same conduct requiring the sentence on one of the counts to be stayed pursuant to section 654, and that his convictions for grand theft must be stricken as lesser included offenses of his financial elder abuse convictions. We shall affirm the judgment.

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[2] The abstract of judgment accurately reflects each of the imposed prison terms, but erroneously reflects the total time imposed and not stayed as eight years. The correct total is 10 years and eight months. Because this is simply a clerical error, we correct it on appeal and will direct the trial court to amend the abstract of judgment accordingly. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 ["Courts may correct clerical errors at any time, and appellate courts . . . that have properly assumed jurisdiction of cases have ordered correction of abstracts of judgment that did not accurately reflect the oral judgments of sentencing courts"].) Any party aggrieved by this procedure may petition for rehearing. (Gov. Code, § 68081.)

FACTUAL BACKGROUND

We summarize the facts in the light most favorable to the judgment. (*People v. Hatch* (2000) 22 Cal.4th 260, 272.)

Victim Jeanette K.

Eighty-three-year-old Jeanette K. lives in a trailer at a mobile home park on her social security and a small pension. She is housebound and sleeps in a lift chair. In March of 2007, Jeanette K.'s daughter took her to defendant's store, National Medical Services (NMS), to purchase a new lift chair. Defendant showed Jeanette K. some brochures and later visited her home. Jeanette K. agreed to purchase a lift chair and gave defendant a check for $1,000 as payment in full in advance. Defendant told her the chair would be delivered in three weeks and cashed her check. Jeanette K. signed a sales slip or receipt reflecting the purchase.

When the chair did not arrive, Jeanette K. called NMS and talked to defendant. Defendant told her the chair was still in the shop or there was trouble with it. After a series of further phone calls by Jeanette K. and her daughter over a couple of months, Jeanette K. and her daughter returned to defendant's store. Defendant told them the chair had been destroyed when the truck transporting it was in an accident and caught fire. Defendant told Jeanette K. he could get another one in 10 or 11 days. Jeanette K. agreed to wait, but if the chair did not arrive in that time, she wanted her money back. Defendant told Jeanette K. he could not write her a refund check

as he was not the owner, but only the manager of the store. Jeanette K. never received the chair or her money back.

Victims Doreen Y. and Logan Y.

Eighty-three-year-old Logan Y. and his 81-year-old wife, Doreen Y., wanted a trailer to carry Logan Y.'s motorized scooter. They went to NMS where defendant offered to sell them a $2,200 trailer for a discounted price of $1,800 if they paid with a cashier's check. They gave defendant a cashier's check for that amount. Doreen Y. later called defendant to order a hitch for the trailer and gave defendant their credit card number to pay the $316 cost of the hitch. Two days later there was a $3,901 charge on their credit card account to defendant's store, although they had not bought anything in that amount and had not authorized the charge. They tried to contact defendant, but he did not answer the store phone and he was not in the store when Logan Y. went by to discuss the matter. Doreen Y. contacted the credit card company fraud department and eventually had the charge reversed.

Doreen Y. and Logan Y. denied they purchased a bed from defendant that accounted for the charge to their credit card account.[3]

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[3] Logan Y. was unavailable to testify at trial. His testimony was introduced through the presentation of the videotape of his testimony at defendant's preliminary hearing, which also served as a conditional examination of Logan Y.

Logan Y. and Doreen Y. received the trailer about a month after it was ordered. Defendant promised to register the trailer title for them, but actually registered the trailer in the name of Independent Mobility Products (IMP), a business owned by Elizabeth Henning, defendant's ex-wife.

Victim Grace R.

Seventy-four-year-old Grace R. lives by herself in a mobile home trailer. She uses a wheelchair to get around. She called NMS and spoke with defendant about purchasing a lift for the back of her car to transport her power chair. Defendant came to her trailer to discuss her purchase. They agreed on a purchase price of $800 for the lift. Defendant told Grace R. she had to pay in cash. Grace R. borrowed the money from her sister-in-law and gave defendant $800 in cash. Defendant gave her a receipt and told her it would take approximately two months for the lift to arrive as it was coming from Florida.

When the lift did not arrive as promised, Grace R. called defendant. Defendant told Grace R. there had been a hurricane in Florida and the lift was held up or destroyed. Grace R. believed him and waited another period of time for the lift to arrive. When she did not receive it, she called again. This time defendant told her the business in Florida was behind and it would take longer for the lift to arrive. While she was still waiting, Grace R. heard defendant was in jail. She called and made a report of defendant's actions regarding her lift.

She never received the lift or her money back. She is still paying her sister-in-law back for the loan of the money.

Victim Helen B.

Eighty-six-year-old Helen B. has limited mobility. She visited NMS as she was interested in seeing if she could get a motorized scooter that would fit in her small car. Defendant did not have what Helen B. was looking for in the store, but assured her a motorized scooter could be found to fit her needs. Defendant came to her home the next day to show her two scooters. Helen B. was not satisfied with the models defendant brought, but agreed to purchase a four-wheel scooter from a catalog on defendant's assurance that it would work for her. Defendant told her it was available at a special price for a limited time of $1,395. Helen B. gave defendant a personal check for that amount. Defendant told Helen B. the scooter was coming from Fresno and it would arrive the following week. Defendant immediately cashed the check.

When the scooter did not arrive after four weeks, Helen B. called NMS and got a taped message. When defendant finally returned her call, he told Helen B. his staff had forgotten to order the scooter, but he would place the order. Helen B. waited another three weeks before calling defendant again. This time defendant told her that the manufacturing company did not have the color she ordered. Helen B. told defendant she did not care about the color and defendant said he would let the company know right away. Later defendant called and offered Helen B. a

different scooter if she gave him an additional $200. Helen B. refused as she wanted the original, smaller scooter because she had a small car.

Finally, defendant called Helen B. to tell her the scooter had been shipped and would arrive on May 22. On May 21, Helen B. received a message from defendant asking her to call. Helen B. called defendant and left a message that she would be available at home for delivery of the scooter anytime on the 22d. Defendant called to say he could not deliver the scooter on the 22d, but would deliver it on the 23rd. On May 23, defendant called to say he was running late. He would deliver the scooter around 5:30 p.m. When defendant showed up with a scooter, Helen B. was tired. She signed the paper he showed her and directed him to put the scooter in her living room. A couple of days later, Helen B. examined the receipt and scooter and noticed defendant had delivered a different scooter than the one she had ordered. The scooter defendant delivered would not fit in her car. Helen B. tried to contact defendant, but never heard back from him. Helen B. never received the scooter she ordered or a refund. Helen B. contacted the sheriff's department.

Detective Hudson

Placer County Sheriff Detective James Hudson investigated several complaints of fraud involving defendant and NMS. NMS was located in the city of Auburn. There were two signs above the door of the store; one for NMS and one for IMP. The 2004

fictitious business statement for NMS showed defendant as the business registrant. The 2005 fictitious business statement showed Lawrence Orzalli (defendant's stepson) as the new owner. Hudson contacted Elizabeth Henning inside the store. She told Hudson her function at the store was to do the Medicare billings. Hudson never found anyone who had any contact with Orzalli at the store.

In August 2007, Hudson executed a search warrant at the store. Hudson seized hundreds of medical assistance supplies, but did not find any office records, files or paperwork. Defendant's desk drawers had been emptied. Hudson found, but did not seize, about 10 bags of coffee at the store. When Hudson confronted defendant, Hudson accused defendant of being dishonest and called him a crook. Defendant nodded affirmatively. Hudson showed defendant a form signed by Orzalli and said, "But you're the crook." Defendant answered "yes." Defendant's explanation for nondelivery of items was that he was just an employee of the store. He did not own the store and complaints had to be forwarded to Orzalli. Defendant claimed he had no idea how to contact Orzalli.

Hudson tracked Orzalli to the Bay Area. Orzalli told Hudson he allowed defendant to use his name to open the business because defendant could not get credit. Orzalli said he did not have any ability to make decisions at the business. Defendant did.

Uncharged Conduct Admitted Into Evidence

Sixty-seven-year-old Rosemary C. has multiple sclerosis, which has resulted in her using a wheelchair. She purchased a wheelchair ramp from defendant at NMS in 2005 using a credit card. In June 2007, she noticed an unauthorized charge of $740.48 from NMS on the same credit card account. She did not purchase anything from NMS after the wheelchair ramp in 2005. She had no dealings at all with defendant or NMS since that time. She did not authorize defendant to charge her credit card account for any amount. Rosemary C.'s credit card company investigated and eventually reversed the charge.

Prior Conduct From Case No. 62-026649 - The Securities Violation Case

James Becker is a special agent with the California Department of Justice, assigned to the special crimes unit of the Attorney General's office during 1999 to 2003. Becker testified he investigated defendant during that time for selling securities, specifically certificates of deposit. Becker spoke with 25 of defendant's alleged victims, ranging in age from 62 to 78.

Harry F. was a victim. Harry F. went to see defendant about buying an advertised certificate of deposit (CD).[4] Harry F. was not wealthy, but had a few dollars that he did not

[4] Harry F. was deceased at the time of trial. His testimony was introduced by having Becker read portions of the preliminary hearing transcript and the introduction of the transcript.

need to live on right away that he thought he could put into a CD. Harry F. told defendant he was interested in putting $30,000 into a three-year CD at the advertised rate of 6.5 percent interest. He did not want a 25-year CD because of his advanced age (Harry F. was 80 years old in 2003 when he testified at defendant's preliminary hearing). Defendant wrote up a contract for a 25-year CD. Defendant told Harry F. not to worry about it, that it was for three years, and that there was no penalty for early withdrawal. Harry F. went ahead with the transaction based on defendant's explanation. When Harry F. subsequently received the paperwork for the CD in the mail, he discovered he had interests in two CDs with 30-year terms with interest payable at maturity. When Harry F. questioned defendant, defendant told him not to worry. Harry F. knew something was wrong after he received statements reflecting large amounts of interest accrued for only a few months of investment. He was irked and wanted to get out from under the investment. Harry F. went to see defendant who told him he would have to sell it. Harry F. told defendant to sell the CDs because he wanted his $30,000 back. Defendant said he would handle it, but told Harry F. not to contact the bank as the bank would not know who he was. Harry F. continued to pursue the matter until defendant was evidently as irritated with Harry F. as Harry F. was with defendant. Defendant told Harry F. he would get Harry F. his money back if Harry F. signed a pledge to

buy an annuity from defendant's company. Harry F. did so. Harry F. was "anxious" to get his money back.

Harry F. was credited with interest on the CDs and paid income taxes on the interest, but never received the interest. Eventually, Harry F. recovered $24,931.26 of his initial investment after a receiver liquidated the company that held title to the CDs that held Harry F.'s money.

Defense

Defendant testified on his own behalf.

Defendant testified he was a financial planner prior to getting into the mobility equipment industry. He admitted suffering convictions on October 24, 2003, for four counts of violating Corporations Code section 25110. When asked for his understanding of the nature of that offense, defendant gave a garbled explanation suggesting the Department of Corporations erroneously considered CDs to be securities despite defendant's status as an FDIC broker.[5] Defendant claimed the Department of Corporations singled him out for prosecution.

Defendant explained his sale of CDs to Harry F. and claimed he had discussed the 25-year term with him. Defendant claimed Harry F. could liquidate at anytime. Defendant testified there was no such thing as a three-year CD. Defendant said he was paid a 3 percent commission for sale to Harry F.

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[5] Defendant's explanation ignores the fact he was apparently selling share interests in CDs, not direct-issued CDs.

Defendant testified he owned R.C. Henning Coffee Company and during the time Orzalli owned NMS, defendant's primary role and source of income was selling and distributing coffee, which he did from the premises of NMS. Defendant claimed he was only a volunteer for NMS, helping his wife and son to build their business. When defendant got proceeds for a sale for NMS, defendant would bring back the purchase order and give the money to his wife. She made the deposits. All checks and credit cards were run through NMS's bank. The same was true for IMP. Defendant did not take any of the proceeds for himself.

As to Rosemary C., defendant did not remember her and had no knowledge of the later charge on her credit card account. Defendant had no idea who processed the charge.

As to Helen B., defendant claimed there were problems with the scooter she purchased. Initially it was not ordered and then it was not available in the color she wanted. Defendant claimed Helen B. agreed to accept the different scooter after they discussed its superiority.

As to Jeanette K., defendant testified he wrote her refund check for $1,000 on June 20, 2007. He mailed the check the day he wrote it and never heard back from Jeanette K. again.

As to Grace R., defendant testified he would not accept a check from her relative made payable to Grace R. for the lift she ordered. Although he preferred not to take cash, he agreed in Grace R.'s case to accept cash. He did not tell her she had

to pay in cash. The lift was not delivered to Grace R. because it was seized by the Placer County Sheriff's Department.

As to Logan Y., defendant testified Logan Y. phoned in an order to him for an adjustable bed and that Logan Y. authorized the $3,900 credit card charge for that purchase. Defendant claimed the trailer purchased by Logan Y. was registered to IMP because Elizabeth Henning wanted it done that way in case the customer did not accept the item. Once the item was delivered, the customer was to title it in their name.

Defendant testified Detective Hudson was belligerent when he came into the store, called defendant a crook and told defendant he was going to take everything defendant owned. Defendant remained calm and did not make any affirmative gesture in response. Hudson did not ask about records. There were records in the office that day and defendant would have showed Hudson any records he wanted. Hudson kept saying it did not matter and he did not want to hear it. Defendant denied moving any of the records.

DISCUSSION

I.

Admission Of Evidence Under Evidence Code Section 1101, Subdivision (b)

A. Background

Noting the "core" issue in this case was "whether the charged conducts are criminal acts or merely inadequate customer service[,]" the prosecution moved in limine to be allowed to

introduce evidence pursuant to Evidence Code section 1101, subdivision (b) (section 1101(b)) of: The underlying facts in defendant's prior securities violation case and the credit card charge to Rosemary C.'s account in NMS's name.

After reviewing the transcript of defendant's preliminary hearing in the securities violation case, the trial court found defendant's conduct underlying his prior securities convictions amounted to defrauding elderly people by "selling them investment instruments that were not what it was [*sic*] represented to be, and elderly people lost money." The court felt such conduct was "relevant to the present charges, particularly when it's essentially the same intent, the same type of conduct. Similarities are evidence on the record. So [the] fact that the defendant committed fraud against elderly people in the past and now is charged once again is clearly relevant, particularly to the defendant's intent in this case." The court ruled the evidence was admissible under section 1101(b) "as going to motive and intent." The court stated it had "weighed the probative value versus the prejudicial effect under Evidence Code [section] 352," and that it felt the evidence should be admitted. "[E]ven though it did occur back in '97, '98 or '99, in that time frame, it's not too remote. It is highly probative[.]" The trial court directed the prosecution "to cull it down to the four counts" to which defendant pled guilty.

Ultimately, the prosecution introduced the testimony of Becker that he investigated defendant for selling securities, that he spoke with 25 of defendant's alleged victims, ranging in age from 62 to 78, and that Harry F. was a victim. The prosecution introduced the preliminary hearing testimony of Harry F.

Turning to the proposed testimony of Rosemary C., the trial court ruled the evidence "plainly admissible under [section] 1101(b)" as such evidence showed that at around the same time period as the charged allegations defendant "defrauded another elderly victim by using her credit card without authorization[.]" The trial court found "it . . . relevant to the defendant's intent. Intent is what is at issue here in this trial. It's close in time. Doesn't appear to take up undue consumption of time. So I weighed Evidence Code section 352. I'm going to allow it under that section."

On appeal, defendant argues the trial court prejudicially erred in admitting the three instances of prior and uncharged crimes in the form of the testimony of Rosemary C., the preliminary hearing testimony of Harry F., and the testimony of Becker as to the number of victims involved in his investigation of defendant. We conclude the trial court did not err.

B. Analysis

Evidence of a person's character is inadmissible to prove the person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) However, section 1101(b) allows admission

of "evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, [or] absence of mistake or accident . . .) other than his or her disposition to commit such an act."

"'The admissibility of other crimes evidence depends on (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crimes to prove those facts, and (3) the existence of any rule or policy requiring exclusion of the evidence.' [Citation.] Evidence may be excluded under Evidence Code section 352 if its probative value is 'substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' [Citation.] 'Because substantial prejudice is inherent in the case of uncharged offenses, such evidence is admissible only if it has substantial probative value.' [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 22-23.)

Section 1101(b) renders admissible evidence of prior acts in three general categories: identity, common design, and intent. The least degree of similarity between the uncharged act and the charged offense is required to prove intent. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402-403.) "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably acted with the same intent

in each instance." (*People v. Lindberg, supra,* 45 Cal.4th at p. 23.)

"On appeal, we review a trial court's ruling under Evidence Code section 1101 for abuse of discretion." (*People v. Roldan* (2005) 35 Cal.4th 646, 705, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421.)

Defendant claims the trial court erred in admitting the testimony of Rosemary C. because there was no indication that defendant was the person using Rosemary C.'s credit card. We disagree. First, we note defendant failed to object at the trial court level to the admission of the evidence on this ground. Defendant's only argument at the trial court level to the admission of Rosemary C.'s testimony under section 1101(b) was that the incident occurred subsequent to the charged offenses. Second, defendant's contention lacks merit. Rosemary C. specifically recalled handing her credit card to defendant when she purchased the wheelchair ramp from NMS in 2005. An unauthorized charge by NMS appeared on her statement for the same credit card in June 2007. It is a reasonable inference that defendant, who handled her credit card earlier at NMS and was still selling equipment at NMS in 2007, was the person who made the unauthorized charge.

Defendant also contends the "trial court failed to perform the proper analysis of the probative value of such evidence verses [*sic*] its prejudicial effect." "In fact[,]" defendant argues, "it would appear that the court did no such analysis

whatsoever. The court makes no mention of looking at the prejudicial effect of such evidence, but rather determines that there would be no undue consumption of time."

The law in California is now clear that "a trial court, in making a determination whether certain evidence is substantially more prejudicial than probative, 'need not expressly weigh prejudice against probative value--or even expressly state that [it] has done so . . . .'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) In any event, the court did include its Evidence Code section 352 analysis on the record by stating it found the evidence relevant to intent, it was close in time, and would not involve any undue consumption of time. The trial court specifically stated it had "weighed Evidence Code section 352."[6] There was no error in admitting the testimony of Rosemary C.

Defendant claims on appeal the trial court erred in admitting the preliminary hearing testimony of Harry F. under

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[6] In his reply brief, defendant additionally claims Rosemary C.'s testimony should have been excluded as creating a confusion of issues based on the danger that the jury may have wanted to punish defendant for the uncharged offense. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 738; *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405.) We do not allow appellants to raise new points in a reply brief, which should have been and could have been raised in the opening brief, because to do so would be unfair to the respondent. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763-766; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.) In any event, we see no reason to believe the trial court did not weigh such danger in its Evidence Code section 352 evaluation.

section 1101(b). Defendant contends the trial court failed to undertake any analysis of the emotional impact, i.e., the prejudicial effect, of such evidence, particularly the significantly greater financial loss of Harry F., and that there are no similarities between the facts underlying his prior securities case and the present case, except that they involve older persons. We conclude the trial court did not abuse its discretion in admitting the evidence under section 1101(b).

The testimony of Harry F. revealed a situation where an elderly person expressed an interest in a particular product (a three-year CD) to defendant, who then purported to sell him that product, but in fact delivered an inappropriate different product (a 25-year or 30-year CD) to defendant's pecuniary advantage. This situation was distinctly similar to the situation involving Helen B.'s purchase of a scooter and defendant's delayed delivery of an inappropriate different scooter. Moreover, "[t]he least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] . . . [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 402.) Other crimes evidence is relevant to the issue of intent because "'"if a person acts similarly in similar situations, he probably harbors the same intent in each

instance" [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent.'" (*People v. Gallego* (1990) 52 Cal.3d 115, 171, quoting *People v. Robbins* (1988) 45 Cal.3d 867, 879.) Here, defendant acted in a sufficiently similar way in the course of the CD sales transaction with Harry F. to strongly lead to a reasonable inference that defendant acted intentionally and fraudulently to take advantage of the elderly customers of NMS, as alleged in this case, and that the alleged delivery problems were not simply poor management or customer service.

Nor do we find the trial court abused its discretion in evaluating the evidence pursuant to Evidence Code section 352. It is true that Harry F. sustained an approximately $5,000 loss in his $30,000 investment transaction with defendant while the victims' ultimate losses in this case ranged from $800 to approximately $1,500. However, we do not view such monetary difference to be that significant in light of the facts of this case. Here, the transactions involved mobility products that impacted the elderly victims' physical ability to maintain their independence--a factor likely to have an even greater emotional impact than any financial investment loss suffered by an elder. The prejudice from the dollar value of the transaction did not outweigh the substantial probative value of Harry F.'s testimony.

Finally, defendant argues the trial court abused its discretion in ruling Becker could testify to his investigation

of defendant for securities fraud and specifically that he spoke to 25 alleged victims. Defendant claims the probative value was minimal, the prior conduct was remote in time, and the fact that defendant was not punished for the 25 frauds, but was convicted on only four counts of selling unregistered securities, "a possible slap on the hand[,]" made it likely the jury would want to exact punishment for the prior frauds in the present case. We disagree.

Prior to its ruling, the trial court reviewed the preliminary hearing transcript in defendant's securities violation case. Such transcript reflects a general overview of defendant's actions in 1997 and 1998 with respect to the alleged victims. Defendant operated a business called the CD Store in Roseville, California. He advertised, in a local newspaper, CDs that were FDIC insured and that had no commissions or fees.

Many elderly people came into defendant's store requesting to purchase short-term CDs, expecting to have the full amount of money they gave to defendant invested in a CD held at a bank in their name. Instead, their money was forwarded to a business called CD Services. CD Services deducted from the money an amount for a commission, pooled the money with other investors' money and purchased a long-term jumbo CD from various banks. The jumbo CD was held in the name of CD Services. Defendant's customers ended up holding a fractional share in a long-term CD owned by CD Services with interest paid at the end of the term. The trial court accurately summarized defendant's conduct as

amounting to defrauding elderly people by "selling them investment instruments that were not what it was [*sic*] represented to be, and elderly people lost money." Defendant's pattern of conduct with respect to these multiple, elderly investors was strongly probative of defendant's intent regarding the victims in the present case. This evidence was properly admissible under section 1101(b) for the same reason Harry F.'s testimony regarding his specific investment experience with defendant was relevant.

Moreover, although the evidence discussed by the trial court and the parties in connection with the prosecution's motion in limine allowed for the admission of a broader range of testimony by Becker, the evidence actually introduced before the jury was much narrower. Becker testified he investigated defendant for selling securities, in this case, CDs; that he spoke with 25 "alleged" victims, and that Harry F. was a victim. Becker did not testify that his investigation showed defendant had committed "securities fraud" with each, indeed any, of the 25 alleged victims. The information regarding his investigation was provided as background to the introduction of Harry F.'s testimony. There is very little likelihood the jury was significantly influenced by Becker's testimony regarding his investigation. Indeed, to the extent the jury connected Becker's investigation to defendant's subsequent conviction of four counts of selling unregistered, nonexempt securities, the jury would likely have concluded there were not 25 actual

victims and defendant did not commit securities fraud, but a registration violation of the Corporations Code.

II.

Admission Of Evidence Under Evidence Code Section 1109, Subdivision (a)(2)

"[I]n a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person," Evidence Code section 1109 (section 1109) permits "evidence of the defendant's commission of other abuse of an elder or dependent person." (§ 1109, subd. (a)(2).) Defendant contends the trial court erred in admitting the testimony of Harry F. as propensity evidence under this section.

Defendant first claims the trial court erred because there was no indication defendant's conduct caused Harry F. physical harm or mental suffering or deprived him of food or medical care. Defendant's argument is premised on the definition of elder abuse provided in section 1109, which reads as follows: "'Abuse of an elder or dependent person' means physical or sexual abuse, neglect, *financial abuse*, abandonment, isolation, abduction, or other treatment *that results in physical harm, pain, or mental suffering*, the deprivation of care by a caregiver, or other deprivation by a custodian or provider of goods or services that are necessary to avoid physical harm or mental suffering." (§ 1109, subd. (d)(1), italics added.)

Harry F.'s testimony contains sufficient indication that defendant's conduct caused him mental suffering. Harry F. was

not a wealthy man. He had some money that he did not need to live on right away that he thought he could put into a CD. When he realized something was wrong with the CD defendant sold him, he started to question defendant. Defendant told him not to worry. Harry F. was "irked" and wanted to get out from under the investment. Harry F. continued to contact defendant, apparently multiple times, trying to get his money back, until defendant became as irritated with Harry F. as Harry F. was with defendant. Harry F. was "anxious" to get his money back. When considered together, this testimony reflects Harry F. was mentally distressed by finding the investment defendant sold him was not what he had intended to purchase.

Defendant next claims the remoteness of the transaction involving Harry F. made the evidence inadmissible under subdivision (e) of section 1109, which provides that "[e]vidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." Not so. Defendant's transaction with Harry F. took place in September 1997, less than 10 years before the crimes in this case began in March 2007.

The trial court did not err in admitting the prior testimony of Harry F. under section 1109.

III.

Admission Of Evidence Of Defendant's Convictions For Impeachment

Defendant contends the trial court erred in ruling his prior convictions of violating Corporations Code section 25110 (section 25110), unlawful selling of unregistered, nonexempt securities, could be used as impeachment evidence. We agree, but find the error harmless.

"Any prior felony conviction that 'necessarily involve[s] moral turpitude' is admissible to impeach a witness's testimony. (*People v. Castro* (1985) 38 Cal. 3d 301, 306 [211 Cal. Rptr. 719, 696 P.2d 111] (Castro).)" (*People v. Feaster* (2002) 102 Cal.App.4th 1084, 1091.) "'"Moral turpitude" means a general "'readiness to do evil'" [citation], i.e., "an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." [Citations.] *Castro* makes no attempt to list or define those felonies which involve moral turpitude, but it makes clear that moral turpitude does not depend on dishonesty being an element of the felony. "[I]t is undeniable that a witness' moral depravity of *any kind* has some 'tendency in reason' [citation] to shake one's confidence in his honesty." [Citation.]'" (*People v. Sanders* (1992) 10 Cal.App.4th 1268, 1272, quoting *People v. Mansfield* (1988) 200 Cal.App.3d 82, 87.)

"Nevertheless, only if 'the least adjudicated elements of the conviction necessarily involve moral turpitude' is the

conviction admissible for impeachment. (*Castro, supra,* 38 Cal. 3d at p. 317.) The 'least adjudicated elements' test means that 'from the elements of the offense alone--without regard to the facts of the particular violation--one can reasonably infer the presence of moral turpitude.' [Citations.]" (*People v. Feaster, supra,* 102 Cal.App.4th at p. 1091.)

Section 25110 states: "It is unlawful for any person to offer or sell in this state any security in an issuer transaction . . . unless such sale has been qualified [i.e., registered] . . . or unless such security or transaction is exempted or not subject to qualification . . . ." As to penalty, Corporations Code section 25540, subdivision (a) provides, in pertinent part: "[A]ny person who willfully violates any provision of this division [including section 25110] . . . shall upon conviction be fined not more than one million dollars ($1,000,000), or imprisoned in the state prison, or in a county jail . . . or be punished by both that fine and imprisonment."

The California Supreme Court considered the nature of this offense in *People v. Salas* (2006) 37 Cal.4th 967 (*Salas*). The Supreme Court confirmed that section 25110 is a general intent crime; not a strict liability offense. (*Salas, supra,* at p. 975.) It concluded the offense contains a mental aspect of guilty knowledge, meaning either knowledge of facts showing the security's nonexempt status or criminal negligence in failing to determine the security's status. (*Id.* at p. 971, fn. 2.) The

Supreme Court held "a seller who believes reasonably and in good faith that a security is exempt is not guilty of the crime of unlawful sale of an unregistered security." (*Id.* at p. 971.) However, "in this context guilty knowledge is not an element of the crime. Rather, a defendant's reasonable good faith belief that a security is exempt from registration is an affirmative defense on which the defense bears the initial burden of proof." (*Id.* at pp. 971, 981-982.)

Contrary to respondent's argument and the trial court's apparent view of *Salas*, the Supreme Court has not found a fraudulent intent to be an element of selling unregistered, nonexempt securities in violation of section 25110. Thus, a defendant may be found guilty of selling unregistered nonexempt securities upon evidence that defendant either had knowledge of facts showing the security's nonexempt status, or criminal negligence. Placing this in the context of the multiplicity of possible security exemptions (see Corp. Code, §§ 25102, 25103, 25104, 25105) and the intricacy of securities law and regulation, we hold the least adjudicated elements of a criminal violation of section 25110 do not demonstrate such a readiness to do evil or moral depravity as to amount to moral turpitude.

Nevertheless, we find the trial court's error in ruling defendant could be impeached with his convictions under section 25110 to be harmless under any standard. Defendant was investigated for and charged with 30 counts of securities fraud (Corp. Code, §§ 25401, 25540) in the prior action. As part of a

plea bargain, defendant pled to four counts of violating section 25110. We have already concluded the evidence of defendant's underlying conduct in the prior securities transactions was admissible evidence under section 1101(b) and the testimony of Harry F. was additionally admissible under section 1109. In light of this, the admission of the evidence that defendant had been held criminally liable for four counts of violating section 25110 would have assured the jury that defendant had been found responsible for his prior conduct. Defendant did not suffer prejudice from the admission of the evidence of his prior convictions.

IV.

Cumulative Error In The Admission Of Evidence

We have found only one error in the admission of evidence, which we have determined to be harmless. There is no cumulative error to consider.

V.

Sufficiency Of The Evidence Of Theft By False Pretenses

Defendant contends there is insufficient evidence to support his five convictions for grand theft by false pretenses because the prosecution produced no evidence defendant made a false representation or intended not to perform at the time Jeanette K., Grace R., Helen B., and Doreen and Logan Y. ordered a product from him. Defendant also argues the prosecution failed to meet the corroboration requirement of theft by false

pretenses. (§ 532, subd. (b); *People v. Katcher* (1950) 97 Cal.App.2d 209, 213-214.)

"'"To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt."' [Citation.] The pertinent inquiry is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Romero* (2008) 44 Cal.4th 386, 399.)

The elements of theft by false pretense are (1) defendant made a false pretense or representation to the owner of property, (2) with the intent to defraud the owner of that property, and (3) the owner transferred the property to the defendant in reliance on the representation. (*People v. Miller* (2000) 81 Cal.App.4th 1427, 1440; *People v. Whight* (1995) 36 Cal.App.4th 1143, 1151.) "[A] promise made without intention to perform is a misrepresentation of a state of mind, and thus a misrepresentation of existing fact, and is a false pretense . . . ." (*People v. Ashley* (1954) 42 Cal.2d 246, 262.) Defendant's words, conduct, nonperformance and other circumstances are to be considered together in determining whether defendant's promise constitutes a false pretense.

(*People v. Fujita* (1974) 43 Cal.App.3d 454, 467-468.) Defendant's intent to defraud is often established by circumstantial evidence. (*People v. Caruso* (1959) 176 Cal.App.2d 272, 278.) Evidence of defendant's similar transactions with other parties is admissible to show a "criminal system of operation." (*People v. Shearer* (1927) 83 Cal.App. 321, 332.)

There is overwhelming circumstantial evidence here that defendant intended not to perform at the time he obtained the checks and cash from the victims. The transactions involving Jeanette K. (a lift chair) and Grace R. (a power lift) show a distinct pattern of defendant purporting to sell a product on condition of immediate full payment, never delivering the product, making repeated similar excuses for nondelivery, and never refunding the customers' money. The transaction involving Helen B. follows that pattern, although defendant did eventually deliver a scooter--one that Helen B. did not order and that did not suit her requirements. The transaction with the trailer delivered to Doreen and Logan Y. with title registered in a company associated with defendant's wife is similar to the transaction with Harry F. as Harry F. too ended up with a product not titled in his name. Considered together, these sales establish a clear pattern of criminal conduct. We add to this pattern, the mysterious "disappearance" of the records of NMS when Hudson contacted defendant in the investigation of

complaints of his fraud and defendant's admission to Hudson that he was a "crook." Defendant's fraudulent intent was obvious.

Theft by false pretenses has a corroboration requirement. Section 532, subdivision (b), provides in pertinent part: "Upon a trial for having, with an intent to cheat or defraud another designedly, by any false pretense, . . . , having obtained from any person any labor, money, or property, . . . , *the defendant cannot be convicted if the false pretense was expressed in language unaccompanied by a false token or writing*, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or *unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances*." (Italics added.)

The prosecution in this case relied on the purchase orders/sales receipts given to each victim as the accompanying writing corroborating defendant's false pretenses. Defendant points out on appeal that the writing used to corroborate a false pretense must itself be false. A genuine writing not containing a false statement does not meet the statutory requirement. (*People v. Katcher, supra*, 97 Cal.App.2d at pp. 213-214 [considering predecessor statute to § 532, subd. (b)]; 2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 44, pp. 70-71.) Defendant claims the purchase orders/sales receipts were genuine documents that bound NMS to provide the item purchased.

Assuming defendant is correct that the writings relied upon by the prosecution were genuine and so could not be the accompanying "false token or writing" required by section 532, subdivision (b), defendant's convictions are nevertheless supported by substantial corroborative evidence. The statute provides that evidence of corroboration of the false pretense may also be in the form of "the testimony of two witnesses, or that of one witness and corroborating circumstances." (§ 532, subd. (b).) Corroboration by multiple witnesses may be established even if the witnesses testify to separate occasions, provided the transactions and defendant's representations are similar in nature, showing defendant used a similar scheme or type of false pretense. (*People v. Miller, supra*, 81 Cal.App.4th at p. 1442; *People v. Gentry* (1991) 234 Cal.App.3d 131, 139; *People v. Keefer* (1973) 35 Cal.App.3d 156, 162.)

As we have already discussed, the transactions involving Jeanette K., Grace R., and Helen B. reflect the same type of scheme by defendant to obtain money from elderly customers for purchases of products he did not intend to supply. Each of the victim's testimony provides corroboration for the others. The transaction involving Jeanette was additionally corroborated by the testimony of her daughter. Defendant's theft by false pretense with respect to the transaction with the trailer delivered to Doreen and Logan Y. was corroborated by the testimony of Doreen and Logan as well as defendant's prior transaction with Harry F. Additional corroborative

circumstances for all counts include the disappearance of all the records from NMS and defendant's admission of being a "crook."

Substantial evidence supports each of defendant's convictions of grand theft by false pretense.

VI.

Sufficiency Of The Evidence Of Financial Elder Abuse

Defendant was convicted of five counts of financial elder abuse under section 368, subdivision (d). Section 368, subdivision (d), provides that: "Any person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates Section 530.5 proscribing identity theft, with respect to the property or personal identifying information of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult, is punishable by imprisonment . . . ; and by a fine . . . or by both . . . fine and imprisonment." Subdivision (g) of section 368 defines "elder" as "any person who is 65 years of age or older."

Defendant contends there is insufficient evidence to support his conviction of five counts of financial elder abuse under section 368. He principally relies on his previous argument that the evidence for theft by false pretense was insufficient, although he also argues the evidence did not support a theory of theft by larceny or embezzlement. He concedes here the evidence was sufficient to meet the elements

of unauthorized use of personal identifying information or larceny by use of a credit card in connection with the unauthorized charge on the credit card account of Doreen Y. and Logan Y., but claims reversal is required because there was a legally insufficient theory (theft by false pretense) available for those two counts. Defendant's argument fails because sufficient evidence not only supports the credit card theft theory for Doreen and Logan Y., but the theft by false pretense theory for each of the victims including Doreen Y. and Logan Y., as we have explained.

VII.

Instructional Error In CALCRIM No. 1804

The trial court instructed the jury on the elements of theft by false pretense pursuant to Judicial Council of California Jury Instructions (2006-2007), CALCRIM No. 1804. With respect to the corroboration requirement of theft by false pretense, CALCRIM No. 1804 provides several options, as follows:

"You may not find the defendant guilty of this crime unless the People have proved that:

"[A. *The false pretense was accompanied by either a writing or false token*(;/.)]

"[OR]

"[(A/B). There was a note or memorandum of the pretense signed or handwritten by the defendant(;/.)]

"[OR]

"[(A/B/C). Testimony from two witnesses or testimony from a single witness along with other evidence supports the conclusion that the defendant made the pretense.]" (Italics added.)

The jury here was instructed with only option "A" that "[t]he false pretense was accompanied by either a writing or false token[.]" Defendant claims this portion of CALCRIM No. 1804 is legally incorrect because it does not inform the jury the writing accompanying the false promise must also be false, i.e., it cannot be a true genuine document. Respondent asserts the statute requires a "false token" but makes no such requirement for a "writing." Defendant has the better argument.

Former section 1110 provided that a defendant could not be convicted of theft by false pretense "if the false pretense was expressed in language unaccompanied by *a false token or writing*, unless the pretense, or some note or memorandum thereof is in writing, subscribed by or in the handwriting of the defendant, or unless the pretense is proven by the testimony of two witnesses, or that of one witness and corroborating circumstances." (Former § 1110 enacted by Stats. 1872, amended by Stats. 1889, c. 17, § 1, Stats. 1905, c. 533, § 3, p. 696, italics added.) In 1989 section 1110 was repealed and this same language was added to section 532 as subdivision (b). (Stats. 1989, c. 897, §§ 22, 35.) Thus, for more than a hundred years the California Penal Code has required corroboration for theft by false pretense by either "a false token or writing" or a writing subscribed by or in the handwriting of the defendant or

testimony of two witnesses or testimony of one witness and corroborating circumstances.

Case law has construed the phrase "'a false token or writing'" to require a false token or a false writing. A genuine writing not containing a false statement does not meet the statutory requirement. (*People v. Gibbs* (1893) 98 Cal. 661, 663-664; *People v. Katcher, supra*, 97 Cal.App.2d at pp. 213-214; see *People v. Beilfuss* (1943) 59 Cal.App.2d 83, 91.) Such construction comports with the grammatical structure of the statutory phrase as the word "false" modifies both token and writing. Such construction is also compelled by "the fundamental rule of statutory construction that requires every part of a statute be presumed to have some effect and not be treated as meaningless unless absolutely necessary. 'Significance should be given, if possible, to every word of an act. [Citation.] Conversely, a construction that renders a word surplusage should be avoided. [Citations.]' [Citations.]" (*People v. Arias* (2008) 45 Cal.4th 169, 180.) If "false" does not modify "writing," so that any writing is sufficient, the further language of the statute, which provides an alternative form of corroboration through a writing subscribed by or in the handwriting of the defendant would be rendered meaningless. We confirm that this portion of section 532, subdivision (b), cannot be satisfied by a true or genuine writing.

CALCRIM No. 1804 fails to inform the jury that the writing must be false by inverting the sequence of the terms to read "a

writing or false token." The instruction is erroneous and must be amended.

In this case, the jury was given only the erroneous portion of CALCRIM No. 1804 regarding corroboration. Thus, the jury was not instructed correctly that the corroborating writing must be false and it was not instructed as to the other possible methods of corroboration. Nevertheless, we find the error to be manifestly harmless under any standard of review. The jury convicted defendant of all five counts of grand theft by false pretense. The evidence established a similar type of scheme and kind of false pretense by defendant in getting the victims to part with their money. Abundant, indeed overwhelming, corroboration was present in the testimony of the multiple victims, as well as the corroborating circumstances.

VIII.

Unanimity Instructions

Defendant claims the unanimity instructions given to the jury (CALCRIM No. 1861 and CALCRIM No. 3500) failed to inform the jury that it was required to analyze each offense separately and that CALCRIM No. 3500 suggested the prosecution needed to prove only one act for the jury to find defendant guilty of all the charged offenses. Defendant further complains the verdict forms did not identify the victim as to each count, "giving an additional impression that the proof of any one act of theft must prove that all acts of theft took place."

CALCRIM No. 1861 as given stated:

"The defendant is charged in Counts One through Five with Theft from Elder under four theories of theft: [¶] Theft by larceny, theft by false pretenses, theft of personal identifying information, and embezzlement. [¶] Each theory of theft has different requirements, and I have instructed you on all. [¶] You may not find the defendant guilty of theft from an elder unless all of you agree that the People have proved that the defendant committed theft under at least one theory. But all of you do not have to agree on the same theory."

CALCRIM No. 3500 as given stated:

"The defendant is charged with Elder Abuse and Theft by False pretenses somewhere between 1/1/07 and 7/31/07. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed."

"In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record. [Citations.] When a claim is made that instructions are deficient, we must determine whether their meaning was objectionable as communicated to the jury. If the meaning of instructions as communicated to the jury was unobjectionable, the instructions cannot be deemed erroneous. [Citations.] The meaning of

instructions is no longer determined under a strict test of whether a 'reasonable juror' *could* have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276; accord, *People v. Cain* (1995) 10 Cal.4th 1, 36-37.) We assume that jurors are intelligent persons who are capable of understanding and correlating all jury instructions that are given. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148-1149, overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151; *People v. Mills* (1991) 1 Cal.App.4th 898, 918.)

We find no reasonable likelihood the jury would have understood from the references to multiple counts and a defined time period in CALCRIM No. 1861 and CALCRIM No. 3500, as given by the trial court, that it was not required to analyze each count separately. Indeed, the jury could not have so understood the instructions as it was specifically instructed, immediately after CALCRIM No. 3500, that "[e]ach of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." (CALCRIM No. 3515.) In instructing the jury, the trial court described each count charged and identified the alleged victim for that count. The trial court also indicated it would send a copy of "the pleadings," by which we assume he meant the second

consolidated information, into the jury room. The parties stipulated to allow that. The jury returned separate verdicts for each count. While the verdict forms did not identify the victim in each count by name, the forms indicated the jury found defendant guilty of the specified offense "as charged in [a specifically identified count number] of the Second Consolidated Information." There were no references to multiple or duplicate count numbers. In her closing argument, the prosecutor addressed defendant's offenses against each victim. We find no error.

IX.

Cumulative Instructional Error

We have found only one instructional error, which we have determined to be harmless. There is no cumulative instructional error to consider.

We have considered whether the single instructional error together with the single evidentiary error together rise to the level of reversible error and conclude they do not.

X.

The Application Of Section 654 To Counts Three And Four

Count three charged defendant with violating section 368, subdivision (d) (financial elder abuse), with respect to Doreen Y. Count four charged defendant with violating section 368, subdivision (d) (financial elder abuse), with respect to Logan Y. Defendant contends one of the convictions must be stayed pursuant to section 654 based on the following reasoning.

According to defendant, the couple's purchase of the trailer cannot support his conviction of counts three and four because Doreen Y. and Logan Y. received the trailer they ordered. Defendant contends the only conduct that could support the convictions was the unauthorized charge to their credit card account. Doreen and Logan share such account. Therefore, there was a single act, a single course of conduct by defendant for which only one punishment may be imposed under section 654. Defendant is wrong.

Section 654, subdivision (a), states, in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "The statute 'literally applies only where [multiple] punishment arises out of multiple statutory violations produced by the "same act or omission." [Citation.] However, . . . its protection has been extended to cases in which there are several offenses committed during "a course of conduct deemed to be indivisible in time." [Citation.]' [Citations.]" (*People v. Hicks* (1993) 6 Cal.4th 784, 789; see *People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209; see *Neal v. California* (1960) 55 Cal.2d 11, 19.)

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor.

If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. California, supra*, 55 Cal.2d at p. 19.) Ascertaining a defendant's intent and objective is primarily a question of fact for the trial court whose express or implied finding that the crimes were divisible will be upheld on appeal if there is substantial evidence to support it. (*People v. Osband* (1996) 13 Cal.4th 622, 730.)

Here, the trial court stated it was imposing consecutive one-third of the middle term sentences on count three and count four because the crimes were distinct from and independent of defendant's other crimes. The record of defendant's actions supports the trial court's conclusion defendant committed two crimes against Doreen Y. and Logan Y. that were not part of a single, indivisible course of conduct. Contrary to defendant's claim, the trailer transaction could form the basis for defendant's conviction of financial elder abuse of Doreen Y. and Logan Y., as we have explained. The unauthorized charge to their credit card, even if a single act as to their joint account,[7] was entirely separate and distinct from the trailer

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[7] Respondent argues sentencing on both counts is correct even if only the credit card theft is considered because there were multiple victims. Respondent is incorrect. The multiple victim exception to section 654 is limited to crimes of violence and does not include crimes against property interests. (*People v. Bauer* (1969) 1 Cal.3d 368, 377-378; see *People v. Davey* (2005)

order and purchase, which occurred several days earlier. Therefore, there were two acts that could be punished without violation of section 654.

XI.

Grand Theft Is Not A Lesser Included Offense Of Financial Elder Abuse (§ 368, subd. (d))

Defendant claims his five convictions for grand theft must be stricken because grand theft is a necessarily included offense of his convictions of financial elder abuse under section 368, subdivision (d). Not so.

A defendant cannot stand convicted of both a greater and a lesser included offense. (*People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Pearson* (1986) 42 Cal.3d 351, 355.) "In deciding whether multiple conviction is proper, a court should consider only the statutory elements." (*People v. Reed* (2006) 38 Cal.4th 1224, 1229.) Under the elements test, "if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former. [Citations.]" (*People v. Lopez* (1998) 19 Cal.4th 282, 288.)

The offense of grand theft by false pretense (§§ 484, subd. (a), 487, subd. (a)) is not a necessarily included lesser offense of a violation of section 368, subdivision (d) under the elements test, because it is entirely possible to violate

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133 Cal.App.4th 384, 391-392; *People v. Hall* (2000) 83 Cal.App.4th 1084, 1088-1090.)

section 368, subdivision (d) without committing grand theft. Section 368, subdivision (d) may be violated by a variety of acts other than grand theft, such as forgery, fraud, or identity theft. (§ 368, subd. (d).) As such, grand theft is not a necessarily included offense of financial elder abuse. (*People v. Parson* (2008) 44 Cal.4th 332, 349 [assault is not a lesser included offense of robbery because robbery can be committed by force or fear, not only by force].)

DISPOSITION

The judgment is affirmed.

We order correction of the abstract of judgment to reflect the total prison sentence imposed and not stayed is 10 years and eight months. We direct the trial court to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

CANTIL-SAKAUYE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.